

**Access to Microfinance & Improved Implementation of Policy
Reform
(AMIR Program)**

Funded By U.S. Agency for International Development

**Analysis of the Legal Regime Related
to Banking Confidentiality and Credit Reporting**

Final Report

**Deliverable for SMI Component, Task No.3.3..3
Contract No. 278-C-00-98-00029-00**

January, 2000

This report was prepared by International Business Legal Associates, in collaboration with Chemonics International Inc., prime contractor to the U.S. Agency for International Development for the AMIR Program in Jordan.

Analysis of the Legal Regime Related to Banking Confidentiality and Credit Reporting

This legal opinion will deal with the question of whether there are any existing statutory laws or customary rules or precedents which prohibit the establishment of a Credit Bureau in Jordan and what would be the legal base and legal requirements for such an organization . We will also discuss if there was any legal rules which puts an obligation on banks not to divulge information related to their clients and if there are any exemptions to such rules. Finally we will explore the new Draft Banking Law and discuss if it was sufficient to establish a legal basis for banks to participate in a Credit Bureau .

Brief of findings

Currently there are no statutory laws which regulate credit reporting in Jordan except one Article ¹in the Central Bank of Jordan Law which gives the Central Bank of Jordan (CBJ) the exclusive authority to provide a “credit reference “ service.

Such service is very limited and gives basic credit background information on clients who borrow more than JD 30,000 and it is exclusive to banks only . This service is regulated by instructions issued by the (CBJ) .

Regarding Banking laws , there are no provisions which deals with credit reporting . However , there is a new draft banking law which will permit banks to exchange credit information between themselves without the intervention of the CBJ. This draft does not permit the exchange of information with non – banks.

Moreover, there are some provisions which constrain/prohibit the exchange of credit information , those are :

- 1- The Jordanian Constitution provides that “Personal Freedom” is a Human Right that has to be protected. Therefore a person has the right to keep confidential any information related

¹ Article 37/b of the Central Bank of Jordan Law.

to his financial status, and such right could be restricted or have exceptions if it is in the public interest and if such exception is provided by a law.

- 2- There are some statutory provisions which restrict the divulge of information by professionals and companies.

Conclusion & Recommendations

Our conclusion is that a Jordanian “Credit Reporting Act” is necessary to be enacted for the following reasons:

- 1- Any restriction on Human Rights provided by the Constitution has be provided by a law.
- 2- To supersede provisions in various laws which restrict the divulging of information.
- 3- To allow banks to exchange information with other non-banks entities.
- 4- To fill in the gap caused by the absence of laws regulating the credit reporting and to address many relevant issues that are not regulated anywhere in the Jordanian legislation such as :
 - The liability of all parties ,
 - The parties who may use the service of the Bureau,
 - The ability of the government to obtain reports,
 - The obligation of banks to participate and give accurate information,
 - The purposes for which a report could be issued by the credit bureau,
 - The liability on any non-accurate information given by the Bureau or the providers,
 - The type/amount/limits of information given in a report
 - The protection of consumers.

Analysis

FIRST: Provisions establishing confidentiality obligations:

There are several provisions in Jordanian Law which establish a legal obligation on persons, entities, and banks to maintain confidentiality, such provisions are:

- 1- Article 7 of The Constitution provides “personal freedom shall be protected”.

- 2- Article 355 of The Criminal Law provides for imprisonment for a person who accessed secret information in the course of his profession and divulged it without legitimate authority.
- 3- Common practice rule regarding Banks.
- 4- Article 158 of the Company Act.
- 5- Article 44 of the Civil Service Regulation.

The Constitution:

The Jordanian Constitution, in Article (7), has protected the personal freedom of a person. According to some scholars, personal freedom is considered a category of the civil human rights and is classified into the right to live, to right to move freely, the inviolability of homes, and the confidentiality of correspondences.

The right of a person to keep all information about his personal life confidential is part of the personal freedom and should be protected under Article (7). The International Human Right Declaration of 1948 also states in Article (12) that “ abusive interference in a person’s life, family, home or correspondence shall be prohibited.”

However, the legislative history proves that the legislator has passed laws which are restrictive to a person’s rights because the public interest required so. One example is the Tax Law that requires a person to divulge all financial information for purposes of implementation of the Tax Law.

Also the International Human Rights Agreement states that the human rights could be restricted for public interest purposes provided that such restriction is done within certain conditions and limits and must be provided by the law. ²

We conclude that although the establishment of a reporting system in Jordan would restrict part of a person’s freedom, such restriction is acceptable because it has benefits to the public interest, and such restriction must be provided by a law.

Criminal law:

As for the Criminal Law, the question whether this provision could be applied to banks depends on whether banking is considered a “profession” in the meaning of Article 355.

² Article 1 of the First Protocol of the European Agreement on Human rights , 1953 .

There is debate between Jordanian scholars on this issue.

One argument against is that banking is considered a “Trade” according to Article 6 of the Commercial Code No 12/1966, and this makes it far from being a “profession.” Of course, this rule will not be applied if there was an approval or waiver from the concerned person. Other arguments conclude that banks can be sued according to this Article.³

There are no precedents on the interpretation of this Article. It is also worth mentioning that no cases were reported in which a bank was sued for divulging information on the basis of this Article.

The French Criminal Law which is the historical source for the Jordanian Criminal Law, has a criminal provision similar to Article 355. The French precedents on this regard indicate that the professions which are meant in this provision are the “Confidance necessaire” relations, which exist when people are obliged to deal with a professional because they need his service. In the course of this service they have to disclose to him confidential information, and since there are no precedents whether the Bank-client relation is as such, the French jurisprudence is therefore divided.

In Egypt, they also had the same provision and there was a debate whether banks are included. This debate was concluded when a new Banking Secrecy Law appeared which expressly penalized the breach of confidentiality by Banks and considered it as a felony.

If the DRAFT banking law passes, then Article 75 of it, which considers unlawful the divulge of information as a criminal violation will supersede Article 355. This will bring an end to the debate.

Some countries, like Egypt, consider the breach of confidentiality a civil violation AND a criminal offence, while some other countries, like Lebanon, consider it a civil violation only.

It seems that the Jordanian Draft is influenced by the Egyptian Law because it considers violations of secrecy obligation on banks a felony.

Customary law :

³ Mohammad Abu Omar, Master thesis on Criminal liability on unlawful divulge by banks, 1999

Article 202 / Civil Code provides:

“1- The contract shall be performed according to its provisions and in a manner consistent with the requirements of good faith.
2- The contract shall not be limited to the obligations of the contracting parties by its provisions but shall also include what the law, custom, and the nature of disposition attach thereto.”

Article 224 / Civil Code provides:

“ custom shall have the same power as any condition in the contract.”

According to Articles 202/2 and 224 of the Civil Code, the common practice is considered an obligatory source of law. The customary rule has two conditions to become established and obligatory: it is applied consistently while out of a conviction that it is obligatory.

We concluded that a customary rule concerning confidentiality exists in the Jordanian legal system. Such conclusion is supported by the result of the visits to different banks whose managers stressed that they and almost all banks in Jordan agree that information about the clients' accounts or credit should be kept confidential. Moreover, there is consistency in such practice. The strict procedures applied by the CBJ when providing credit information service is a sign that there is a feeling that banking secrecy is binding.

But what are the boundaries for such customary rule?

As for third parties, which are non-banks, all banks agreed that they never divulge information unless one of the statutory exemptions occurs.⁴

As for direct exchange of information with other banks, banks differ in this regard. Some of them share information with other banks only through the Central Bank of Jordan feeling that direct correspondence with other banks is contrary to their obligation of secrecy. Others correspond directly with other banks without feeling that it is against their duty. However, when banks exchange information amongst themselves, they only give very general valuation of the client such as his dealing and reputation. No specific details, number, figures, or transactions are mentioned in banks' inquiries. Furthermore, when a bank replies to another bank's inquiry

⁴ look at “Statutory Exemptions to the obligation of confidentiality” which comes further in this paper.

about a client, the corresponding bank does not mention the name of the client or any reference thereto in its reply.

The Companies law

Article 158 of The Companies Law no 22 /1997, provides:

“The Chairman, Board members of a public company, its general manager, and any employee are prohibited from disclosing any information or data related to the company and is considered confidential which they obtained in the course of their profession or work to any shareholder or to any other person. In case of such disclosure, The company has the right to terminate employment and seek compensation. Information and data which are permitted to be published by virtue of other laws or regulations are exempted.”

This provision puts an obligation on every employee, board member, chairman of a company (including banks) not to divulge confidential information.

Civil Service Regulation:

Article 44 of Civil Service Regulation no. 1 for 1988 provides:

“ The public servant is prohibited under the threat of disciplinary measures, from doing the following acts:

b. Disclosure of any data or information which are determined as confidential by virtue of instructions, decisions or laws or disclosure of any data or information that is confidential by nature.”

This Article puts an obligation on the public officials, including those working at the Tax Dept., Central Bank, and any other government dept. or agency to not divulge confidential information, which they access in the course of their business. Accordingly, information related to credit and banking transactions and accounts are included in this Article because they are by nature and by custom confidential.

SECOND: Statutory Exemptions to the obligation of confidentiality:

- 1- Article 105 of the Civil Procedure Law No 24 /1988, empowers courts to give an order to a bank, upon the request of a party in a litigation, to permit that party to view that bank's records and obtain copies therefrom.
- 2- Article 145 of the same Law empower courts to issue a provisional order to a bank to freeze the defendant's account and to issue a letter to the court which states exactly how much money the account contains.
- 3- Article 98 of the Criminal Procedure Law No 9/1961 empowers the public attorney to request any document from any person that he thinks is necessary for the investigation.
- 4- Article 37 of the Central Bank Law that gives the right to the CBJ to provide the credit information service to Banks.

THIRD: Statutory provisions on credit reporting:

The Central Bank Law No 23 / 1971

Article 37/b provides that “ The Central Bank shall provide the Licensed Banks with services for inter-bank clearings and for exchange of credit information relating to their clients and these banks SHALL participate in such arrangements as the Central Bank may prescribe for these purposes after consultation with them.”

This provision is the only statutory provision that deals with the exchange of credit information. It is not clear from the language if this provision prohibit banks from exchanging information not through the CBJ. The language also indicates that it is designed only for banks and financial companies.

The Draft Banking Law:

- 1- Article 72 of this Draft has a provision which states the principle of confidentiality:
“ Each Bank shall keep confidential all information regarding its clients' accounts, deposits, trusts, and safes and it shall not release any such information directly or indirectly except upon a written approval of the owner of the account, deposit, trust or safe, or his heirs or upon a

decision by a competent judiciary authority in a current legal suit, or upon the occurrence of any of the exemptions provided for in this Law.

Such prohibition will stand even if the relation between the Bank and his client has come to an end for any reason.”

This provision will be the first Article in the history of Banking legislation that provides for Banking confidentiality and secrecy and therefore such provision will replace the customary rule on confidentiality.

The definition of the word “ Bank” means commercial Banks, branches of foreign Banks, and specialized lending Institutions or Banks.

The Central Bank has the authority to include The Financial Companies within the frame of this Article.

2- Article 74/d provides: “ Exchange of information between the Banks regarding their client’s credit to make the credit decisions safer ” . Such Article will provide a legal base for flow of information between banks and arguably will be a legal base for establishment of the credit reporting service in Jordan.

It is debatable that this article would be legally sufficient to establish a Credit Bureau. On the one hand it does not state clearly that Banks have the right to incorporate a private entity which will handle the exchange, it also does not suggest the mechanism by which such exchange could be handled ,and on the other hand the definition of Banks does not include NON –BANKS entities or other potential credit providers (such as NGOs, car sellers, etc...).